

REMARKS

The pending Office Action addresses and rejects claims 1-6, 11-13, 15, 24, and 37-40. Applicants respectfully request reconsideration in view of the amendments and remarks herein.

Interview Summary

At the outset, Applicants thank the Examiner for extending the courtesy of a telephone interview on June 24, 2009 to Applicants' undersigned representative and Michael Visconti. During the interview, it was agreed that the amendment submitted herewith would be effective in overcoming the pending rejections of claims 39-40.

Amendments to the Claims

Applicants amend claim 39 to recite that at least a part of the distal portion of the body has a height distinct from a width taken along a cross-section of the body such that the body can distract vertebrae between which at least a part of the distal portion has been placed by rotation of the body about the major axis. Support for this amendment can be found in claim 2 and throughout the specification and drawings, for example in Figures 4A-4B and in paragraphs [0033], [0045-0047], and [0070]. No new matter is added.

Statement of Common Ownership – MPEP § 706.02(l)(2)

Claims 1-6, 11-13, 15, 24, and 37-38 are rejected pursuant to 35 U.S.C. § 103(a) as being obvious over U.S. Publication No. 2004/0073213 ("Serhan") in view of U.S. Publication No. 2004/0102774 ("Trieu"). 35 U.S.C. § 103(c)(1) provides that:

Subject matter developed by another person, which qualifies as prior art only under one or more of subsections (e), (f), and (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person.

Serhan is only available as prior art under 35 U.S.C. § 102(e) and, at the time the claimed invention was made, both the claimed invention and Serhan were owned by the same entity or subject to an obligation of assignment to the same entity. Accordingly, Applicants submit that Serhan is **disqualified** as prior art under 35 U.S.C. § 103(c)(1) and any rejection in view thereof should be withdrawn.

Claim Rejections Pursuant to 35 U.S.C. § 103(a) – “Hochschuler”

Claims 39-40 are rejected pursuant to 35 U.S.C. § 103(a) as being obvious over U.S. Publication No. 2002/0058947 (“Hochschuler”). Applicants respectfully disagree.

Claim 39 recites an intervertebral fusion device that includes a body having a proximal portion along a major axis of the body and a distal portion along the major axis. At least a part of the distal portion of the body has a height distinct from a width taken along a cross-section of the body such that the body can distract vertebrae between which at least a part of the distal portion has been placed by rotation of the body about the major axis. As agreed by the Examiner during the interview summarized above, Hochschuler altogether lacks such a body.

Accordingly, claim 39 is not obvious over Hochschuler and represents allowable subject matter. Claim 40 is likewise allowable at least because it depends from claim 39.

Conclusion

Applicants submit that all claims are in condition for allowance, and allowance thereof is respectfully requested. Applicants’ amendment of the claims does not constitute a concession that the claims are not allowable in their unamended form. The Examiner is encouraged to telephone the undersigned attorney for Applicants if such communication is deemed to expedite prosecution of this application.

Date: June 24, 2009

Nutter McClennen & Fish LLP
World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210-2604
Tel: (617) 439-2766
Fax: (617) 310-9766

Respectfully submitted,

By: 

Lisa Adams, Reg. No. 44,238
Attorney for Applicant(s)